

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,)
Plaintiff,) Case No.: 2:10-cr-236-GMN-PAL
vs.)
JABARI L. MARSHALL,)
Defendant.)

)

Pending before the Court is the Petitioner Jabari L. Marshall’s (“Petitioner’s”) Motion to Vacate under 28 U.S.C. § 2255. (ECF No. 498). The Government filed a Response (ECF No. 501), and Petitioner filed a Reply (ECF No. 502).

I. BACKGROUND

On January 11, 2012, a federal grand jury sitting in the District of Nevada returned a Second Superseding Indictment charging Petitioner with one count of Conspiracy to Commit Bank Fraud, Mail Fraud, and Wire Fraud, in violation of Title 18 U.S.C. § 1349. (Second Superseding Indictment, ECF No. 114). On September 26, 2013, after a nine-day trial, a jury convicted Petitioner of this charge. (Jury Verdict, ECF No. 358). Petitioner was sentenced to 240 months of imprisonment, followed by three years of supervised release, and restitution in the amount of \$249,695.57. (Judgment at 2–3, ECF No. 470). Petitioner was also advised of his right to appeal. (Sentencing Tr. 38:6–18, ECF No. 486).

On April 10, 2014, Petitioner timely filed a notice of appeal. (Not. of Appeal, ECF No. 465). On appeal, Petitioner asserted the following claims: (1) “the district court erred in denying his motion in limine to exclude evidence pertaining to mortgage-lending businesses,” and (2) “the district court erred in granting the government’s motion to strike surplusage from

1 the second superseding indictment.” (9th Cir. Mem. at 2, ECF No. 493). The Ninth Circuit
2 affirmed Petitioner’s conviction in full. (*Id.* at 4).

3 On March 28, 2016, Petitioner filed the instant Motion to Vacate pursuant to 28 U.S.C.
4 § 2255. (Mot. to Vacate, ECF No. 498).

5 **II. LEGAL STANDARD**

6 Under 28 U.S.C. § 2255, a petitioner may file a motion requesting the Court which
7 imposed sentence to vacate, set aside, or correct the sentence. 28 U.S.C. § 2255(a). Such a
8 motion may be brought on the following grounds: (1) the sentence was imposed in violation of
9 the Constitution or laws of the United States; (2) the court was without jurisdiction to impose
10 the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the
11 sentence is otherwise subject to collateral attack. *Id.*; *see also United States v. Berry*, 624 F.3d
12 1031, 1038 (9th Cir. 2010).

13 Motions pursuant to § 2255 must be filed within one year from “the date on which the
14 judgment of conviction becomes final.” 28 U.S.C. § 2255(f)(1). “[A] district court may deny a
15 section 2255 motion without an evidentiary hearing only if the movant’s allegations, viewed
16 against the record, either do not state a claim for relief or are so palpably incredible or patently
17 frivolous as to warrant summary dismissal.” *United States v. Burrows*, 872 F.2d 915, 917 (9th
18 Cir. 1989). “No evidentiary hearing is necessary when the issue of credibility can be
19 conclusively decided on the basis of documentary testimony and evidence in the record.” *Shah*
20 *v. United States*, 878 F.2d 1156, 1160 (9th Cir. 1989).

21 **III. DISCUSSION**

22 Petitioner asserts five grounds for the dismissal of his conviction. Three of these
23 grounds (grounds one, two, and four) assert that Petitioner’s trial and appellate counsel were
24 ineffective. The remaining two grounds (grounds three and five) assert insufficient evidence
25 for conviction and that the indictment was improperly constructively amended. For the reasons
set forth below, the Court finds that Petitioner has not demonstrated the necessary elements to

1 prevail on a claim of ineffective assistance of counsel, and his other grounds are improperly
2 raised on collateral review.

3 **A. Ineffective Assistance of Counsel Claims**

4 One proper claim under § 2255 is ineffective assistance of counsel. To establish
5 ineffective assistance of counsel, a petitioner must first show that counsel's conduct was not
6 "within the range of competence demanded of attorneys in criminal cases." *Strickland v.*
7 *Washington*, 466 U.S. 668, 687 (1984) (citations omitted). Second, a petitioner must also show
8 that he was prejudiced by that performance. *See id.* at 692. Under this standard, the question is
9 whether "counsel's representation fell below an objective standard of reasonableness," and the
10 Court's inquiry begins with a "strong presumption that counsel's conduct [falls] within the
11 wide range of reasonable representation." *United States v. Ferreira-Alameda*, 815 F.2d 1251,
12 1253 (9th Cir. 1987) (as amended) (citations omitted). "[T]he standard for judging counsel's
13 representation is a most deferential one" because "the attorney observed the relevant
14 proceedings, knew of materials outside the record, and interacted with the client, with opposing
15 counsel, and with the judge." *Harrington v. Richter*, 562 U.S. 86, 105 (2011). Petitioner must
16 also demonstrate that "there is a reasonable probability that, but for counsel's unprofessional
17 errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

18 Petitioner contends that he was denied effective assistance of counsel at trial because his
19 trial counsel did not argue judicial estoppel. (Mot. to Vacate at 19). Additionally, Petitioner
20 asserts that his appellate counsel was ineffective for failing to argue judicial estoppel,
21 insufficient evidence (relating specifically to judicial estoppel), and constructive amendment.
22 (See Mot. to Vacate at 27, 33).

23 The Government argues that all of Petitioner's claims rest on the theory that the
24 Government should have been judicially estopped from asserting inconsistent positions at trial
25 regarding the use of the words "financial institutions" in the Second Superseding Indictment.

1 (See Resp. 4:7–10). Moreover, the Government claims that because Petitioner cannot meet all
2 the elements for the claim of judicial estoppel, all of Petitioner’s ineffective assistance of
3 counsel claims fail. (*Id.* 4:20–21).

4 Judicial estoppel, also known as the doctrine of preclusion of inconsistent positions, is
5 an equitable doctrine invoked by a court at its discretion. *United States v. Ibrahim*, 522 F.3d
6 1003, 1009 (9th Cir. 2008) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001)). The
7 doctrine prohibits a party from gaining an advantage by taking one position and then seeking a
8 second advantage by taking a different position that is incompatible with the first. *See Helfand*
9 *v. Gerson*, 105 F.3d 530, 534 (9th Cir. 1997) (citing *Rissetto v. Plumbers and Steamfitters*
10 *Local 343*, 94 F.3d 597, 600 (9th Cir. 1996)). The doctrine is intended to protect the integrity
11 of judicial proceedings by preventing a litigant from “playing fast and loose with the courts.”
12 *Id.* (citing *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990), which stated: “The integrity of
13 the judicial process is threatened when a litigant is permitted to gain an advantage by the
14 manipulative assertion of inconsistent positions, factual and legal”) (internal citation omitted)).

15 In determining if judicial estoppel should apply, the court considers whether: (a) a
16 party’s later position is clearly inconsistent with its original one; (b) the party has successfully
17 persuaded the court of its earlier position; and (c) allowing the inconsistent position would
18 allow the party to “derive an unfair advantage or impose an unfair detriment on the opposing
19 party.” *Ibrahim*, 522 F.3d at 1009. Because judicial estoppel seeks to prevent deliberate
20 manipulation of the courts, it is inappropriate when a party’s prior position was based on
21 inadvertence or mistake. *See Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692
22 F.3d 983, 995 (9th Cir. 2012) (citing *Ibrahim*, 522 F.3d at 1009, which held that in light of the
23 Supreme Court’s opinion in *New Hampshire v. Maine*, chicanery or knowing misrepresentation
24 by the party to be estopped is a factor, rather than an “inflexible prerequisite,” to application of
25 the judicial estoppel doctrine).

1 1. *Trial Counsel*

2 Petitioner attempts to show that this Court relied on a position asserted by the
3 Government using a partial quote from this Court’s Order Denying the Motion to Dismiss (ECF
4 No. 301). (Mot. to Vacate at 23). However, the Government is correct when it asserts that
5 “[t]his Court did not rely upon or accept the government’s alleged argument regarding the use
6 of the term financial institutions in declining to dismiss the indictment based on statute of
7 limitations.” (Gov’t Resp. 5:1–3, ECF No. 501). Indeed, in the Order cited by Petitioner, this
8 Court expressly declined to reach “whether the pre- or post-2009 amendment version of 18
9 U.S.C. § 20 definition of ‘financial institution’ applies in this case.” (Order Denying Mot. to
10 Dismiss 6:11–12, ECF No. 301). Thus, because the Court did not rely on or accept the
11 Government’s allegedly inconsistent positions, judicial estoppel does not apply here. “[F]ailure
12 to raise a meritless legal argument does not constitute ineffective assistance of counsel.”
13 *Baumann v. United States*, 692 F.2d 565, 572 (9th Cir. 1981). Given that judicial estoppel does
14 not apply, Petitioner’s trial counsel was not ineffective for failing to raise this meritless
15 argument. Accordingly, the Court denies Petitioner’s motion as to ground one because
16 Petitioner fails to demonstrate ineffective assistance by his trial counsel.

17 2. *Appellate Counsel*

18 Grounds two and four of Petitioner’s motion allege ineffective assistance of appellate
19 counsel. Ground two asserts that appellate counsel failed to argue both judicial estoppel and
20 constructive amendment. Ground four asserts that appellate counsel was ineffective for failing
21 to raise an insufficient evidence claim, which Petitioner centers upon his judicial estoppel
22 claim. First, the Court finds that appellate counsel was not ineffective for not advancing an
23 argument for judicial estoppel because it is a non-meritorious issue. (*See supra* Part III.A.1.).
24 Similarly, appellate counsel not raising an insufficient evidence claim resting solely on judicial
25 estoppel does not constitute ineffective assistance.

1 Lastly, regarding appellate counsel’s alleged failure to argue constructive amendment¹
2 of the Second Superseding Indictment, it appears that appellate counsel raised this argument on
3 appeal, and the Ninth Circuit ruled on it. Indeed, Petitioner acknowledges that this issue was
4 raised on appeal, but instead argues that “appellate counsel failed to point out that ‘financial
5 institution’ as used in §§1341 and 1343 is defined by §20 to describe an element.” (Mot. to
6 Vacate at 20). However, on appeal, the Ninth Circuit pointed out that “[d]espite the use of the
7 term ‘financial institutions’ in the indictment, [Petitioner] was not charged with conspiring to
8 commit wire and mail fraud against ‘financial institutions’ as that term is defined by § 20.” (9th
9 Cir. Mem. at 2). Further, specifically regarding constructive amendment, the Ninth Circuit
10 found: “The government’s motion to strike surplusage did not constitute a constructive
11 amendment.” (*Id.* at 4). Appellate counsel cannot be ineffective regarding claims that were
12 raised and decided upon appeal. *See United States v. Hayes*, 231 F.3d 1132, 1139 (9th Cir.
13 2000) (“When a defendant has raised a claim and has been given a full and fair opportunity to
14 litigate it on direct appeal, that claim may not be used as basis for a subsequent section 2255
15 petition.”).

16 Accordingly, the Court denies Petitioner’s motion under grounds two and four because
17 Petitioner fails to demonstrate that his appellate counsel’s assistance was ineffective.

18 **B. Constructive Amendment and Insufficient Evidence**

19 If a claim was or could have been raised on direct appeal, then it is not properly raised in
20 a collateral attack pursuant to § 2255. Specifically, “[w]hen a defendant has raised a claim and
21 has been given a full and fair opportunity to litigate it on direct appeal, that claim may not be
22 used as basis for a subsequent section 2255 petition.” *United States v. Hayes*, 231 F.3d 1132,
23 1139 (9th Cir. 2000). Conversely, “[i]f a criminal defendant could have raised a claim of error

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25¹ “[C]onstructive amendment occurs when the defendant is charged with one crime but, in effect, is tried for
another crime.” *United States v. Pang*, 362 F.3d 1187, 1194 (9th Cir. 2004).

1 on direct appeal but nonetheless failed to do so, he must demonstrate both cause excusing
2 his procedural default, and actual prejudice resulting from the claim of error.” *United States v.*
3 *Johnson*, 988 F.2d 941, 945 (9th Cir. 1993). “To overcome such default, [petitioner] would
4 have to show either (1) ‘cause’ and actual ‘prejudice’ to explain the default, or (2) that he was
5 ‘actually innocent’ of, *inter alia*, the crime for which he was indicted.” *United States v.*
6 *Guess*, 203 F.3d 1143, 1145 (9th Cir. 2000) (internal citation omitted).

7 In ground three, Petitioner argues that his “conviction rest[s] on a constructively
8 amended indictment.” (Mot. to Vacate at 18). Specifically, though, Petitioner’s argument
9 centers on his judicial estoppel assertion. (*Id.*) (see subheading A. stating: “Judicial estoppel
10 prohibits the prosecutor’s deliberate change to position two.”). Petitioner could have raised the
11 issue of judicial estoppel on direct appeal, but failed to do so, which means that this issue is
12 barred by procedural default. *Johnson*, 988 F.2d at 945. While his excuse is that his appellate
13 counsel should have raised the issue and was ineffective for doing so, there can be no actual
14 prejudice because, as the Court found above, judicial estoppel does not apply here. (*See supra*
15 Part III.A.1.).² Accordingly, the Court denies Petitioner’s claim under ground three as
16 procedurally barred.

17 Next, as to ground five, although titled as an insufficient evidence claim, Petitioner
18 actually asserts that he has “the right to be free from the application of Ex Post Facto laws.”
19 (Mot. to Vacate at 23). This issue was reviewed and expressly rejected by the Ninth Circuit on
20 direct appeal: “As conspiring to commit mail and wire fraud was illegal at the time of the
21 crime, regardless of the victim, any allegation that the 2009 amendment to § 20 affected
22 [Petitioner’s] conviction is baseless and his conviction did not violate the Ex Post Facto
23 Clause.” (9th Cir. Mem. at 2–3). As this claim was litigated on appeal, Petitioner cannot

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2 Petitioner does not argue that he is “actually innocent.” *See Guess*, 203 F.3d at 1145.

1 properly raise the issue on a motion to vacate. *See Hayes*, 231 F.3d at 1139. As such, the Court
2 denies Petitioner's motion as to ground five.

3 **C. Evidentiary Hearing**

4 "No evidentiary hearing is necessary when the issue of credibility can be conclusively
5 decided on the basis of documentary testimony and evidence in the record." *Shah v. United*
6 *States*, 878 F.2d 1156, 1160 (9th Cir. 1989) (citation omitted). The district court has discretion
7 to deny an evidentiary hearing on a section 2255 claim. *Id.* Here, the testimony and evidence
8 establish that Petitioner is not entitled to relief because the claims raised by Petitioner were
9 procedurally barred or meritless. These claims can be "conclusively decided on the basis of
10 documentary testimony and evidence in the record." *See Shah*, 878 F.2d at 1160. Accordingly,
11 the Court finds that an evidentiary hearing is not necessary here.

12 **D. Certificate of Appealability**

13 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing
14 Section 2254 and 2255 Cases, district courts are required to rule on the certificate of
15 appealability in the order disposing of a proceeding adversely to the petitioner or movant, rather
16 than waiting for a notice of appeal and request for certificate of appealability to be filed. Rule
17 11(a). In order to proceed with his appeal, Petitioner must receive a certificate of appealability.
18 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946,
19 950–51 (9th Cir. 2006). Generally, a petitioner must make "a substantial showing of the denial
20 of a constitutional right" to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2). "The
21 petitioner must demonstrate that reasonable jurists would find the district court's assessment of
22 the constitutional claims debatable or wrong." *Ornoski*, 435 F.3d at 951 (quoting *Slack v.*
23 *McDaniel*, 529 U.S. 473, 484 (2000)). In order to meet this threshold inquiry, the petitioner has
24 the burden of demonstrating that the issues are debatable among jurists of reason, a court could
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1 resolve the issues differently, or the questions are adequate to deserve encouragement to
2 proceed further. *Id.*

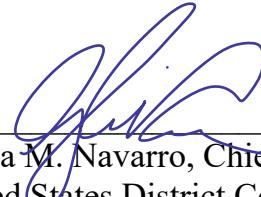
3 The Court has considered the issues raised by Petitioner, with respect to whether they
4 satisfy the standard for issuance of a certificate of appealability, and determines that none of the
5 issues meet that standard. The Court will therefore deny Petitioner a certificate of
6 appealability.

7 **IV. CONCLUSION**

8 **IT IS HEREBY ORDERED** that Petitioner's Motion to Vacate (ECF No. 498) is
9 **DENIED**.

10 **IT IS FURTHER ORDERED** that a certificate of appealability is **DENIED**.

12 **DATED** this 30 day of August, 2017.



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15 Gloria M. Navarro, Chief Judge
16 United States District Court
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